

Mensah (Migration) [2018] AATA 592 (15 February 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Kwabena Banor Mensah
CASE NUMBER:	1700934
DIBP REFERENCE(S):	1690593404 BCC2016/2845526
MEMBER:	Justin Owen
DATE:	15 February 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 15 February 2018 at 11:48am

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Holding a substantive visa at application – Compelling reasons to waive Schedule 3 criteria – Health issues – Applicant taking care of the sponsor – Applicant travelling for work

LEGISLATION

1. *Migration Act 1958*, s 65
Migration Regulations 1994, Schedule 2, cl 820.211, Schedule 3

CASES

Babicci v MIMIA (2005) 141 FCR 285
MZYPZ v MIAC (2012) FCA 478
SZOX v MIBP FCAFC 69
Waensila v MIBP (2016) FCAFC 32

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision of a delegate of the Minister for Immigration on 6 January 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 27 August 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2). The delegate found that the applicant was not the holder of a substantive visa at the time she lodged the partner visa application. The delegate considered the applicant's request to waive the Schedule 3 criteria, but after considering all the circumstances of the application, the delegate concluded there were not compelling reasons to waive the Schedule 3 criteria.
5. The applicant appeared before the Tribunal on 14 February 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Mrs Carmen-Lee Mensah. The Tribunal hearing was conducted with the assistance of an interpreter in the Twi and English language.
6. The applicant was represented in relation to the review by his registered migration agent. The agent attended the hearing.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in this case is whether the applicant meets the Schedule 3 criteria (as attached to this decision), and if not, whether there are compelling reasons for not applying them.

DOES THE APPLICANT MEET SCHEDULE 3 CRITERIA, OR SHOULD THOSE CRITERIA BE WAIVED?

9. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
10. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

11. The applicant provided to the Tribunal a copy of the Departmental decision record. It indicates that the applicant entered Australia on a subclass 600 visitor visa on 17 July 2014 and departed on 15 October 2014. The applicant again entered Australia on a subclass 600 visitor visa on 9 September 2015. This visa ceased on 9 October 2015. The applicant then remained unlawfully in Australia until the lodgement of a Partner Combined (Full Fee) (UK 820/BS 801 visa application on 27 August 2016. The applicant currently holds a Bridging visa C in association with this application.
12. There is nothing before the Tribunal to indicate that the applicant held an entry permit that was valid up to and including 31 August 1994. There is nothing to indicate that the applicant became an illegal entrant before 1 September 1994. There is nothing to indicate that the applicant ceased to hold a criminal justice visa on or after 1 September 1994 or that she entered Australia unlawfully on or after 1 September 1994. There is nothing to suggest that the last substantive visa held by the applicant was cancelled and the Tribunal has made a decision to set aside and substitute the cancellation decision.

CRITERION 3001

13. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
14. The Tribunal finds that the applicant last held a substantive visa on 9 October 2015 when his visitor visa expired. The Tribunal finds that that date is the 'relevant day' within the meaning of subclause 3001(2)(c)(i) of Schedule 3.
15. As the Partner visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.
16. Clause 820.211(d)(ii) allows for this criterion to be waived if the Tribunal is satisfied that there are compelling reasons for not applying the criterion.

COMPELLING REASONS

17. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
18. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babici v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
19. In response to questioning by the Tribunal as to what compelling reasons could potentially constitute reasons for a waiver of the Schedule 3 requirements, the main focus of the applicant's assertions related to the existing health of the sponsor and the support he provides her in successfully addressing a range of health and emotional-related issues.
20. The applicant's written submission to the Tribunal of 12 February 2018 states that the sponsor is suffering from depression, mental symptoms, high blood pressure, hypertension, ventricular hypertrophy, carpal tunnel syndrome, back pain and hypercholesterolemia. This assertion is supported by her GP Dr Richard Marshall (T1, Folio 110). The applicant's

submission claims that the applicant has emotionally and physically supported the sponsor throughout these times in dealing with these issues. Dr Marshall in his letter states that it is of concern to the sponsor's mental state and general health that the applicant might not meet the criteria for the Partner that was applied for. Dr Marshall wrote that a return of the applicant to Ghana would likely have an impact on and exacerbate the sponsor's depression.

21. The applicant stated in oral evidence to the Tribunal that he has been taking care of the sponsor whilst she faces these various health-related issues. His ongoing presence physically and emotionally, he has claimed, is invaluable to the sponsor's health. This claim is supported by the sponsor. The applicant claims the sponsor needs the affection and affirmation he provides in order to successfully address her health-related issues. He asserted to the Tribunal that this sort of emotional and physical support was needed rather than specialist medical treatment. The sponsor agreed that he was a 'constant' in her life that helped enormously with addressing her depression and bringing positivity to her life.
22. The role the applicant plays in the sponsor's life and in helping her manage this wide range of health-related issues has been put forward to the Tribunal as critical and as a compelling reason to waive the Schedule 3 requirements. The Tribunal has reviewed the various arguments and assertions put forward in support of this by the applicant, the sponsor and the applicant's representative.
23. The Tribunal noted the claims by the sponsor and the applicant in oral evidence that the applicant's continued physical and emotional presence with the sponsor is vital to her mental health and well-being. The Tribunal noted the sponsor's written statement of 16 November 2016 (D1, Folio 42) where she wrote 'My husband is working away and we meet often as possible with him returning to home to Singleton weekly or fortnightly and if possible I'll travel to him.' The Tribunal enquired as to how often the applicant is therefore absent from the sponsor. The applicant stated that he works in security, often in Sydney, and his shifts vary in time and duration but he was sometimes away for four days. The sponsor said in oral evidence the applicant was away for three to four nights a week. The Tribunal is of the opinion that this illustrates that the continued and ongoing physical presence of the applicant is not necessarily essential for the sponsor's well-being, as has been claimed by the parties. On the evidence, the applicant and the sponsor are, on average, already spending more than half the week physically apart. In the Tribunal's mind it undermines the claim that the continued physical presence of the applicant to the sponsor is both vital to her well-being and represents a compelling reason for the Tribunal to waive the Schedule 3 requirements.
24. The Tribunal has carefully considered the correspondence of the sponsor's GP Dr Richard Marshall. Dr Marshall expresses concerns for the sponsor's mental state and general health should the applicant fail to be granted an on-shore visa and be forced to return to Ghana. The Tribunal on the evidence does not however view this as a compelling reason to waive the Schedule 3 requirements. The sponsor stated in oral evidence to the Tribunal that she has been treated and has been under the care of Dr Marshall as her GP for many years. This treatment has included the treatment of longstanding depression symptoms. Dr Marshall writes that he had been seeing the sponsor regularly since 2004. The Tribunal has no reason to believe that the support, care and treatment of Dr Marshall will not continue in the forthcoming years. The Tribunal furthermore notes that there is no evidence before it of a specified mental health plan prescribed by a medical professional that states the ongoing presence of the applicant is necessary in the ongoing treatment of the sponsor's depression.
25. The Tribunal notes that the sponsor has been treated for depression since 2008, some seven years before she met the applicant. The Tribunal enquired of the sponsor as to whether her GP had referred her on for any specialist treatment. The sponsor stated that she had seen a psychiatrist in 2004 and 2005 but her doctor had not referred her on to a

specialist for any treatment since. The applicant similarly confirmed this. The Tribunal notes that the sponsor has managed her condition with the support of her GP since 2008. The Tribunal is not convinced the sponsor would be unable to manage her condition should the Tribunal not waive the Schedule 3 requirements and the applicant is forced to reapply for a Partner visa off-shore. The Tribunal does not on the evidence before it consider the claimed support the applicant provides the sponsor in addressing her mental health and wider health conditions as a compelling reason to waive the Schedule 3 requirements.

26. The applicant claims the sponsor's depression will worsen if he has to return to Ghana and reapply offshore. He stated to the Tribunal that the sponsor had issues with her previous relationships and didn't feel valued. He said in oral evidence that he had been open, caring and showed affection to her. The applicant said the sponsor was happy and 'complete' until she realised he might have to return offshore. The sponsor similarly stated to the Tribunal that the applicant comforts and supports her. She views his ongoing presence in Australia as vital to her well-being. The sponsor says the applicant makes her happy, more positive and a better person. Physical separation, the applicant and sponsor have each submitted, will have a particularly adverse and corrosive impact upon the sponsor and her well-being. The physical and emotional support the applicant claims to provide the sponsor as she faces these medical and emotional hardship issues is submitted by the applicant as compelling reasons to waive the Schedule 3 criteria. The Tribunal notes that emotional hardship can be considered a compelling factor in regards to Schedule 3 criteria. The Tribunal however is not convinced that emotional support can only be provided when the couple reside under one roof. There is no reason why the same level of support could not have been provided if the applicant was to live and reapply for a Partner visa outside Australia. That is, the Tribunal is not satisfied that the level of emotional support would be any different if the waiver is not applied. It is not unusual for couples to live separately for a period of time and that should not preclude the provision of emotional support, if this relationship was genuine. The Tribunal notes that in oral evidence the parties already claim to contact each other every day wherever they are each located on that particular day. The Tribunal therefore does not consider these circumstances as justifying a waiver of the Schedule 3 criteria
27. The Tribunal asked the applicant what evidence there was to support his assertion that his physical presence had helped improve the health and well-being of the sponsor and was vital on an ongoing basis. He stated that he was 'very confident' this had been the case but conceded there was 'not much' medical evidence to support this. He asserted that the local community had seen how the sponsor has improved since he had entered a relationship with the sponsor. Similarly the sponsor said that she was calmer and happier since the applicant's arrival in her life and said her friends had noticed this. No evidence was put before the Tribunal at the hearing or submitted beforehand in submissions to corroborate either of these assertions.
28. The applicant's representative at the hearing pointed out that any decision to affirm the delegate's refusal of the applicant's visa application would adversely impact upon an Australian citizen. The Tribunal acknowledges that the sponsor is an Australian citizen but does not consider this in itself represents a compelling reason to waive the Schedule 3 requirements. The applicant's representative also submitted the potential length of time the preparation, processing and assessment of an offshore Partner application might take as a compelling reason to waive the Schedule 3 requirements. Again, the Tribunal states that it is not unusual for couples to live separately for a period of time whilst offshore applications are processed. Emotional support can continue to be provided to each other if a relationship is genuine. In any case, in the circumstances of this case, the Tribunal does not consider this as a compelling reason for a waiver of the Schedule 3 requirements.
29. The sponsor said that she feared that the applicant might not come back if he was forced to reapply for a Partner visa off-shore. The Tribunal makes no assessment as to the nature of

the applicant's relationship with the sponsor and has accepted at face value the claims made by the parties that they were, and continue to be, in a genuine relationship together and the circumstances of that claimed relationship for the purposes of this decision. In the Tribunal's view, separation is not uncommon among partners. The Tribunal also notes that if this relationship is genuine, the applicant will be eligible to apply for a Partner visa in the future and any period of separation is likely to be temporary. In the circumstances of this case, the Tribunal does not consider that the period of temporary separation gives rise to compelling reasons for the waiver.

30. The applicant claimed to the Tribunal that not long after he commenced a relationship with the sponsor he realised the sponsor was suffering from depression. He stated that he therefore decided to take care of her and as a consequence lost track of time whilst caring for the sponsor. He stated to the Tribunal that he then realised 'too late' that his visa had expired, he was now unlawful and consequently was unable to meet the Schedule 3 criteria. The Tribunal is mindful that information about Australia's visa system is readily available on the Department's website and from any Immigration office or a migration agent. The Tribunal considers that the applicant could have easily acquired that information if he had taken any steps to acquire that information. The Tribunal does not consider that the applicant's lack of knowledge of the law constitutes a compelling reason to waive the legal requirements. The Tribunal does not consider the applicant's lack of knowledge of his visa requirements and obligations constitutes a reason to waive the Schedule 3 requirements.
31. The Tribunal notes that the applicant has four children in Ghana aged 8 through to 16 along with his own herbalist business. The Tribunal noted that the applicant however had arrived in Australia on a one month tourist visa, travelled to Maitland two days later where he met the sponsor for the first time at the railway station and almost immediately entered a relationship. Within a few weeks of this the applicant claimed to have decided to remain in Australia long-term – in breach of his visa conditions so he could stay and look after the sponsor after discovering she suffered from depression. The Tribunal enquired at the hearing as to how such a powerful bond between the sponsor and the applicant developed in such a short time - a bond that led to the applicant choosing not to return to his children and his business but now instead asserting a waiver of the Schedule 3 requirements in order to pursue his migration application on-shore. The applicant in response stated that his children are not too young and live with their mother; his business as a herbalist was portable; and he was quite simply happy to be in love and fully committed to his relationship with the sponsor. The Tribunal is not satisfied with this explanation of the development of the relationship and considers it implausible. On the totality of the evidence before it the Tribunal considers these events as evidence of an intention on the part of the applicant to remain in Australia for migration purposes rather than any specific desire to support the sponsor's physical and emotional well-being.
32. In the applicant's submission of 12 February 2018 the applicant's representative asserts that Schedule 3 should not be applied due to the hardship that can result in applying Schedule 3 criteria and notes that the applicant and sponsor have been in a relationship 'for many years now.' The criteria in cl.820.211(2)(a) is that the applicant is the spouse or de facto partner of the sponsoring partner. This, in part, requires the applicant and the sponsor to be in a genuine, continuing and exclusive relationship. If an applicant does not hold a substantive visa and does not meet the Schedule 3 criteria, the requirement in cl.820.211(2)(d)(ii) to provide compelling reasons for not applying those criteria is in addition to the criteria in cl.820.211(2)(a). Accordingly, simply the fact that the parties are in a genuine and continuing relationship is not of itself a compelling reason for not applying the Schedule 3 criteria as it is already a criteria which must be satisfied in order to meet the criteria in cl.820.211(2)(a). If the relationship itself can be considered a compelling reason for not applying the Schedule 3 criteria, it must be the particular aspects of the relationship which must provide a compelling

reason for not applying the Schedule 3 criteria and not simply the fact that the parties are in a relationship.

33. Thus, as a genuine spousal relationship is the basic requirement for a partner visa application, the Tribunal is not satisfied that the genuineness, mutual commitment, emotional support, continuing nature and longevity of the parties' relationship or the parties' temporary separation are on their own, circumstances that should compel the Tribunal to not apply the Schedule 3 criteria. The Tribunal is not satisfied on the evidence that these are compelling reasons not to apply the Schedule 3
34. The Tribunal is mindful that the Explanatory Statement, in providing examples of compelling reasons, states: where the applicant and his or her nominator are already in a long-standing relationship which has been in existence for two years or longer... In these circumstances, waiver **may** be justified by the hardship which could result if the Schedule 3 criteria were not waived (Tribunal's emphasis).
35. The Tribunal is required to apply the legislation which states that it must be satisfied there are compelling reasons for not applying the Schedule 3 criteria. As is stated in SZOXP v MIBP FCAFC 69 at paragraph 14; Context, such as legislative history or extrinsic materials, is a guide to the meaning of the statute but it "cannot displace the meaning of the statutory text" and it is the meaning of the statutory text which is where the task of statutory construction begins and ends: *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2013) 250 CLR 503, 519.
36. The Explanatory Statement and any guidelines produced by the Department do not provide criteria which, if met, satisfy the requirements of the legislation. If the nature of the relationship between the applicant and the sponsor were to be a compelling reason for not applying the Schedule 3 criteria, all the factors of the relationship, including its duration, the level of financial and emotional commitment, the dependence the parties had upon each other and other relevant factors must be considered. As it is made clear in the Explanatory Statement, the examples provided only may justify the waiver of the Schedule 3 criteria. They do not provide a criterion that, if satisfied, becomes a compelling reason for not applying the Schedule 3 criteria and the Explanatory Statement is not part of the statutory text which is to be considered.
37. The Tribunal also acknowledges that the earlier Departmental policy which identified long term relationships as giving rise to compelling reasons but in the Tribunal's view, such policy is more restrictive than, and not consistent with the legislation.
38. In the circumstances of this case, the Tribunal does not consider that the existence of a long term genuine relationship between the applicant and the sponsor, even if one was established, constitutes a compelling reason for the waiver.
39. The Tribunal has considered the totality of the applicant's circumstances. Having considered the circumstances singularly and cumulatively, the Tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).
40. There is no evidence or suggestion the alternative criteria in cl.820.211(3)-(9) apply.
41. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

42. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Justin Owen
Senior Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

SCHEDULE 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.